

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10113) that:

(a) Carrier violated the Clerks' Agreement at Amarillo, Texas, when, on January 7, 1985, it dismissed F. W. Mitchell from service, and

(b) Facts developed at the formal investigation held on January 7, 1985, failed to sustain Carrier's alleged charges and did not justify or warrant the harsh penalty imposed, and

(c) F. W. Mitchell shall now be reinstated to service of the Carrier with all rights unimpaired and paid for all monetary loss sustained as a result of being discharged on January 7, 1985, and

(d) F. W. Mitchell shall be paid an additional twelve per cent (12%) per annum until claim is paid."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Following removal from service on December 21, 1984, an Investigation on January 7, 1985, into allegations of being on duty under the influence of intoxicants, Claimant was notified of his termination from service. That decision was confirmed by a letter of January 7, 1985, from the Amarillo GOB Building Superintendent to Claimant and the Organization.

By letter of February 14, 1985, the Vice General Chairman filed an appeal with the Carrier's General Manager, who denied the appeal on March 28, 1985, on grounds of improper filing under Rule 47-A, as well as on the merits. No written extension of time for handling was agreed upon by the Parties but, apparently by mutual agreement, the Claim was discussed further at the General Manager/Vice General Chairman level on September 16, 1985, when the prior declination of March 28, 1985, was reaffirmed. Under date of September 19, 1985, the General Chairman appealed to the Assistant to the Vice President of Labor Relations, who denied the Claim on the same grounds as the General Manager had done, i.e., failure to comply with Rule 47-A filing requirements and, also for lack of merit.

Carrier presented a colorable case that the Claim may have been filed with the wrong officer at Amarillo. Given the nature of this particular case, however, the Board deems it appropriate to decide the matter on its merits rather than upon what laymen might view as a "technicality." Such handling is predicated upon the facts and circumstances of this particular case and should not be viewed as precedent-setting under Rule 47-A.

Claimant was employed as a Janitor in the General Office Building from 1970 until his termination for alleged Rule G violation on December 21, 1984. During his years of service he accumulated some 140 service demerits. Twice before, in October 1978, and again in November 1979, he was terminated for reporting to duty under the influence of intoxicants. On each of those earlier occasions, however, Carrier relented and reinstated Claimant on a leniency basis after suspensions of approximately six months.

On the afternoon of December 21, 1984, the Carrier's Assistant Superintendent encountered Claimant on an elevator. He thought he smelled a strong odor of alcohol on and about Claimant's person. The supervisor called in the Assistant Chief of Police from Carrier's Western Line to corroborate his suspicions regarding Claimant. Together the two men interviewed Claimant and again the Assistant Superintendent thought that Claimant smelled of alcohol. He asked the Assistant Chief of Police to confirm his observations. The police officer had Claimant take a deep breath and blow in his face. According to the police officer's subsequent testimony "it was obvious the alcohol smell was coming from Mr. Mitchell." Claimant emphatically denied drinking any alcohol since 10:00 PM the night before and suggested the strong smell of alcohol might be coming from his clothing. At Claimant's request, the police officer smelled Claimant's shirt, but could detect no odor of alcohol in the garment. Claimant was then asked to take a blood alcohol test, but he refused. At that point he was removed from service.

In facts and circumstances presented in this case, Carrier had probable cause to require Claimant to submit to a blood alcohol test to confirm whether he had recently consumed alcohol. Two Carrier officials individually smelled a strong odor of alcohol on the person of an employee who twice before had been dismissed for being under the influence of alcohol on the job. In those circumstances, Claimant's failure to submit to a blood test gave Carrier sufficient grounds to draw the negative inference. That inference, together with the other evidence of record in this particular case, supports Carrier's conclusion that Claimant was again under the influence of alcohol while on duty on December 21, 1984. Given Claimant's record of recidivism, there is no basis in this record for disturbing the discharge action taken by Carrier.

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Award No. 28073
Docket No. CL-27337
89-3-86-3-552

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of September 1989.